THE FOUNDATION FOR NATIONAL PROGRESS

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Re: Response to PRR 2012-048 The Lowell Milken Gift to the UCLA School of Law

Dear Ms. Felker:

I write in response to your October 20, 2011 letter denying Mother Jones Magazine's request for public records relating to Lowell Milken's $10 million gift to the UCLA School of Law.

I request that UCLA reconsider its decision, as it is contrary to California law. For the reasons explained below, the records sought by Mother Jones are subject to disclosure under the California Public Records Act. The justifications UCLA provided for withholding the donor agreement sought by Mother Jones have been squarely rejected by the California Court of Appeal. As for the communications sought by Mother Jones, UCLA has fallen far short of making the showing required to withhold that information. Accordingly, the law requires that UCLA release all of the records sought.

History of Mother Jones' Request

In an August 9, 2011 email, Mother Jones reporter Lauren Ellis requested the following from UCLA's office of Records Management and Information Practices:

> "1) any communication (email, phone transcript, meeting notes) between Lowell Milken and the officials in charge of the campaign for UCLA School of Law regarding [Lowell] Milken's donation. . .
>
> 2) any contract, agreement, license, gift related documents regarding the donation. Any official letters at all, in writing, that describe the donation."

UCLA responded on October 5, 2011,[1] providing two letters, one from UCLA Chancellor Gene Block to Lowell Milken, and one from University of California President Mark G. Yudof to Lowell Milken. Portions of these letters were redacted.

UCLA withheld the donor agreement sought by Mother Jones. Citing Cal. Gov. Code 6255(a), you asserted that the "public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." You also refused to release any internal communications "that met the standard of deliberative process."

On October 13, Mother Jones responded to UCLA's failure to produce the donor agreement, citing to *Cal. State Fresno v. Superior Court* (2001) 90 Cal.App.4th 810, 835, which holds among other things that where an agency subject to the California Public Records Act justifies the withholding of public records under Cal. Gov. Code section 6255(a)—as UCLA did—the withholding agency must demonstrate that there is a "clear overbalance on the side of confidentiality."

The October 13 Mother Jones letter noted that UCLA had made "no showing at all," other than "reciting the standard for invoking the deliberative process privilege." It concluded with a request that UCLA explain

> (1) why it thinks the communications between Lowell Milken and UCLA are 'internal communications,' and (2) why the deliberative process privilege applies.

You responded in a letter dated October 20, 2011. You reiterated the position that "in the balance of interests, the public interest is served more by not disclosing these records." You further stated:

> UCLA's ability to protect the personal privacy of its donors is paramount to its ability to fundraise. It is UCLA's position that releasing these documents into the public domain would bring about a chilling effect on UCLA's Foundation, in that the personal privacy of its donors, prospective donors, and those who volunteer their time to the Foundation would no longer be protected.

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[1] UCLA initially responded to Mother Jones' August 9, 2011 request on August 10, 2011, stating that a full response might take "up to eight weeks." Under Cal. Gov. Code 6253(c), public agencies are required to respond to a request within 10 days. "In unusual circumstances," an agency may extend its deadline to respond by up to 14 days. *Id.* UCLA cited no authority for its decision to grant itself a two-month extension.

You further asserted that UCLA withheld "pre-decisional communications" under the deliberative process privilege and California Evidence Code section 1040(a)(b)(2) and that communications were withheld because their "disclosure would constitute an unwarranted invasion of personal privacy."

The Donor Agreement Is Subject to Disclosure Under California Law

All public records in California are subject to disclosure unless the Legislature has expressly provided to the contrary. *See Williams v. Superior Court*, 5 Cal.4th 337, 346 (1993). The party "seeking to withhold public records bears the burden of demonstrating that an exception applies." *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 329 (2007). For withholding to be justified, there must be a "clear overbalance on the side of confidentiality." *Cal. State Fresno*, *supra*, 90 Cal.App.4th at p. 835.

UCLA has asserted two justifications for withholding the donor agreement. First, it asserted the need to protect "the personal privacy of its donors." Second, it asserted that releasing the donor agreement and/or related documents would "bring about a chilling effect on UCLA's Foundation, in that the personal privacy of its donors, prospective donors, and those who volunteer their time to the Foundation would no longer be protected."

The California Court of Appeal has rejected both of these justifications for withholding information about donors to public universities. In *Cal State Fresno*, *supra*, 108 Cal.App.4th at p. 810, the court held that the identities of donors who engaged in license agreements with Cal State Fresno were public records subject to disclosure under the California Public Records Act. Applying the balancing test that UCLA embraced here in its October 20 letter, the *Cal State Fresno* court rejected the university's argument that the privacy concerns of donors outweighed the public interest in disclosure. *Id.* at 834. The court found the privacy concerns to be "minimal." *Id.* *See also American Civil Liberties Union of Northern California v. Superior Court*, 202 Cal.App.4th 55, 74 (2011).

The *Cal State Fresno* court also rejected the university's assertion that "large donations will be cancelled if promises of confidentiality are breached." The court rejected this claim of a "chilling effect" on several grounds. As is pertinent here, the court concluded:

"Statements by University personnel that disclosure of the license agreements will 'likely' have a chilling effect on future donations, resulting in a 'potential' loss of donations, are inadequate to demonstrate any significant public interest in nondisclosure." *Id.* at 835.

Accordingly, your reliance on the purported personal privacy interests of donors, and the purported chilling effect on donations, have been squarely rejected by the California Court of Appeal. UCLA should release the donor agreement.

The Public Interest In Disclosure Outweighs the Public Interest In Non-Disclosure

UCLA asserts that under the balancing test set forth in the so-called "catchall exemption" of Cal. Gov. Code § 6255(a), the public interest in non-disclosure outweighs the public interest in disclosure.[2] As to the donor agreement, other than repeating this assertion and reciting the balancing test set forth in *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325 (1991), UCLA has made no showing as to why the public interest in non-disclosure prevails as to the donor agreement. It does not.

As to both the donor agreement and the communications, the public interest in disclosure is powerful. Lowell Milken donated a significant sum of money—the largest single donation to the UCLA School of Law ever—to a public law school that will use public money to create and operate an institute that will be part of a publicly funded institution with the public purpose of educating and training students to become officers of the court in California and beyond. The conditions of Mr. Milken's donation are essential to understanding whether the state of California, acting on behalf of the people of California, is putting his donation to a proper purpose or whether Mr. Milken has imposed conditions on his donation that run counter to the public nature and spirit of the University of California. What limitations were imposed on the gift? Can UCLA spend it for any purpose? If not, what are they barred from spending the money on? Based on what rationale? What benefits will Mr. Milken get for his donation? Who got to decide what benefits Mr. Milken would receive? Was there any public review of such a decision? What role, if any, will Mr. Milken—who has been banned for life from working in the securities industry—play in educating future California lawyers and businesspeople? What connection, if any, was there between the donation and Mr. Milken's 2009 award from the school as "Public Service Alumnus of the Year"? These questions highlight the significant public interest in disclosure, and the lack of public interest in withholding. The donor agreement should be released.

Communications Between Lowell Milken and UCLA Regarding the Donation Are Subject to Disclosure Under California Law

UCLA asserted that the communications between Lowell Milken and UCLA are "predecisional communications" and therefore exempt from disclosure under the

[2] UCLA appears to base its decision to withhold both the donor agreement and the communications on Section 6255(a). Neither withholding is justified under that section's balancing test.

"deliberative process privilege." However, UCLA cannot legitimately invoke the deliberative process privilege. Moreover, UCLA has not met its burden here of showing that the public interest in withholding outweighs the public interest in disclosure—a fundamental requirement for withholding records based on the deliberative process privilege.

The deliberative process privilege can no longer be invoked as a justification for non-disclosure of public records. Proposition 59 amended the California Constitution to provide a constitutional right of access. The ballot argument in favor of Proposition 59 expressly stated that the constitutional amendment "will allow the public to *see and understand the deliberative process* through which decisions are made." This language communicates the clear message that Proposition 59 was intended to eliminate the deliberative process privilege previously recognized under Section 6255 of the Act.8 Extrinsic aids that were before the voters--such as analyses and arguments contained in official ballot pamphlets--establish the voter's intent that controls the construction of constitutional amendments. *See, e.g., People v. Rizo*, 22 Cal. 4th 681, 685 (2000); *Horwich v. Superior Court*, 21 Cal. 4th 272, 277 (1999); *Robert L. v. Superior Court*, 30 Cal. 4th 894, 903-05 (2003). Therefore, the deliberative process privilege no longer constitutes valid justification for the denial of access to public records.

In any event, the deliberative process privilege does not apply to Mr. Milken's communications with UCLA. First, in determining the application of the deliberative process privilege, "[t]he key question in every case is 'whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1342 (1991). The communications with Mr. Milken do not constitute internal communications or deliberations of UCLA policy-making personnel. UCLA has provided no explanation of how their disclosure would "discourage candid discussion within the agency." The bare assertion that the communications "reflect the [thought] process of the decision-makers" is inadequate to justify secrecy. Assuming deliberative process has any application to external communications of UCLA officials, any internal deliberations in which UCLA engaged regarding this donation were far more likely to be compromised by disclosure to Mr. Milken at the time than by disclosure to the public after the fact, Because the communications do not disclose internal communications of UCLA personnel in any manner that can credibly be asserted as seriously compromising internal discussions, the deliberative process privilege does not apply.

Second, it cannot seriously be contended that secrecy is essential to ensure that potential donors will make donations to UCLA. Unlike the circumstances addressed in *Times Mirror* and other cases, this is not a situation in which the identity of the donor is unknown. UCLA and Mr. Milken chose to publically disclose and promote this donation.

(See, e.g., http://www.law.ucla.edu/centers-programs/lowell-milken-institute-business-law-policy/Pages/default.aspx.) Whatever concerns anonymous donors may have regarding disclosure of their communications with UCLA, Mr. Milkin does not share them, and UCLA may not invoke them under these circumstances.

In its Oct. 20 letter, UCLA purported to make a more detailed showing as to why the deliberative process privilege applies. This showing fails, in part because it is not clear that any of the justifications offered is more than hypothetical (e.g., "*may have been* . . . created prior to the policy decision at issue") (emphasis added). Hypothetical bases for confidentiality cannot support withholding. However, assuming UCLA's asserted interests are more than speculative, they still do not justify withholding of communications related to this issue of critical public importance.

First, the fact that communications are predecisional is a prerequisite for the application of the deliberative process privilege, but is not sufficient to support its application. *See, Times Mirror*, 53 Cal.3d at 1340-1341.

UCLA's second hypothetical justification for withholding is that the communications may have been "of the nature that they simply would not be written if they were required to be disclosed." However, the proposition that the parties would not have documented the terms of their agreement with respect to a donation that was "the culmination of a three-year process of exploration" if not assured that those terms would remain secret is preposterous. Sophisticated parties such as Mr. Milkin and the University of California do not engage in $10 million transactions on the basis of a handshake.

Similarly, UCLA's third justification for withholding, that the communications were "expressly or impliedly written with the intention of being held in confidence" fails to meet UCLA's burden of showing that withholding is justified here. First, UCLA does not assert that there was any express assurance, by either UCLA or Mr. Milkin, that these communications would be kept confidential. Second, even if made, "assurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public." *San Gabriel Tribune v. Superior Court*, 143 Cal.App.3d 762, 775 (1983).

Furthermore, "[n]ot every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence. The burden is on the [entity claiming the privilege] to establish the conditions for creation of the privilege." *California First Amendment Coalition v. Superior Court* 67 Cal.App.4th 159, 172-173 (1998).

In other words, the "deliberative process privilege" is subject to the same balancing test required under the "catchall exemption." Accordingly, even if the deliberative process privilege applied, for the reasons described above (on page 4) the public's interest in disclosure substantially outweighs any marginal interests served by secrecy. Hence, UCLA cannot meet the burden of justifying non-disclosure under the Public Records Act.

Finally, even if portions of the withheld communications contained information that was genuinely subject to the deliberative process privilege—and UCLA has made no showing that this is the case—those portions must be redacted and the remaining portions of the correspondence disclosed. See Cal. Gov. Code § 6253(a); *Northern Cal. Police Practices Project v. Craig*, 90 Cal.App.3d 116, 123 (1979).

Senate Bill 8

UCLA asserts compliance with Senate Bill 8, which has been codified in Cal. Ed. Code §§ 72690 *et seq.*, 89913 *et seq.*, and 92950 *et seq.* It is unclear what relevance Senate Bill 8 has, as it applies to auxiliary organizations associated with universities and colleges, and to foundations associated with the University of California. UCLA has not asserted that the records sought by Mother Jones are being held by either of these types of organizations. In any event, Senate Bill 8 was intended to increase transparency in donor records, as its provisions make plain. *See, e.g.*, Ed. Code § 72696(b)(3) (requiring disclosure of "any other donor-imposed restrictions on the use of a donation"). UCLA asserts there are "no *known* restrictions" on the donation (emphasis added), but that only raises a central question here: how is the public, and the taxpayers who fund UCLA, to know what restrictions there are, "known" or unknown, without access to the donor agreement itself?

Conclusion

UCLA's claimed justifications for withholding the donor agreement have been rejected by the California Court of Appeal. Its justifications for withholding communications related to the Milken donation are insufficient. Mother Jones accordingly reiterates its request that UCLA produce the records sought.

We trust you will agree to abide by the law and release the requested information. We look forward to the prompt disclosure of these records.

Sincerely,

Madeleine Buckingham
President & CEO
Mother Jones Magazine

Cc: Monika Bauerlein
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